

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No.: 2:20-cv-268-WQH-EJY

ORDER

JOSEPH O'SHAUGHNESSY,
individually; MEL BUNDY,
individually; JASON D WOODS,
individually; DAVE BUNDY,
individually; MARYLYNN
BUNDY, individually; BRIANA
BUNDY, individually; BRETT
ROY BUNDY, individually;
MAYSA LYNN BUNDY,
individually; DALLY ANN
BUNDY, individually; BRONCO
CLIVEN BUNDY, individually;
PAYTON ALMA BUNDY,
individually; MONTANA
BUNDY, individually; PEPER
BODEL BUNDY, individually;
BENTILE BUNDY, individually;
PRESLY BUNDY, individually;
KYMBER BUNDY, individually;
and ADAHLEN BUNDY,
individually,

Plaintiffs,

v.

UNITED STATES OF
AMERICA; NADIA AHMED,

1 individually and in her Official
 2 Capacity as an Assistant United
 3 States Attorney for the U.S.
 4 Department of Justice; STEVEN
 5 MYHRE, individually and in his
 6 Official Capacity as an Assistant
 7 United States Attorney for the U.S.
 8 Department of Justice; DANIEL
 9 BOGDEN, individually and in his
 10 Official Capacity as an Assistant
 11 United States Attorney for the U.S.
 12 Department of Justice; DANIEL P
 13 LOVE, individually and in his
 14 Official Capacity as Officer for the
 15 U.S. Bureau of Land Management;
 16 MARK BRUNK, individually and
 17 in his Official Capacity as Special
 18 Agent for the U.S. Bureau of Land
 19 Management; RAND STOVER,
 20 individually and in his Official
 Capacity as Officer for the U.S.
 Bureau of Land Management;
 JOEL WILLIS, individually and in
 his Official Capacity as an Officer
 and Agent of the U.S. Federal
 Bureau of Investigation; DOES 1
 through 100; and ROES 1 through
 100, inclusive,
 Defendants.

21 HAYES, Judge:

22 The matter before the Court is the Motion for Leave of Court to File Second
 23 Amended Complaint filed by all Plaintiffs. (ECF No. 68).

24 **I. BACKGROUND**

25 On February 6, 2020, Plaintiffs Jason O'Shaughnessy, Jason D. Woods, Dave
 26 Bundy, Marylynn Bundy, Mel Bundy, Briana Bundy, Brett Roy Bundy, and ten Bundy
 27 minor children initiated this action by filing a Complaint against several Defendants,
 28 including the United States of America. (ECF No. 1). Plaintiffs alleged numerous claims

1 against Defendants in their individual and official capacities under federal law, arising from
2 the alleged deprivation of Plaintiffs’ constitutional rights. Plaintiffs also alleged a claim
3 pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671, *et seq.*, against the
4 United States. In support of the FTCA claim, Plaintiffs alleged that they submitted an
5 administrative claim on February 3, 2020, i.e., three days prior to filing the Complaint.
6 (ECF No. 1 at 45, ¶ 228).

7 On May 20, 2020, Plaintiffs filed a First Amended Complaint (“FAC”) as a matter
8 of course pursuant to Federal Rule of Civil Procedure 15(a)(1). (ECF No. 11). Plaintiffs
9 again asserted an FTCA claim against the United States and numerous other claims against
10 individual Defendants.

11 On September 22, 2020, Defendants filed a Motion to Dismiss the FAC pursuant to
12 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF Nos. 44, 46). The Court
13 received briefing from all parties (ECF Nos. 52, 56) and conducted oral argument on
14 November 19, 2021 (ECF No. 65).¹ On January 6, 2022, the Court issued an Order granting
15 the Motion Dismiss and dismissing the FAC without prejudice in its entirety. (ECF No.
16 67). With respect to the FTCA claim, the Court stated that the original Complaint and the
17 FAC “failed to allege facts that support an inference that the FTCA claim was
18 administratively exhausted before it was filed,” and therefore “Plaintiffs fail to allege facts
19 sufficient for the Court to conclude that it has subject matter jurisdiction over the FTCA
20 claim.” (*Id.* at 16).

21 On February 5, 2022, Plaintiffs filed the Motion for Leave of Court to File Second
22 Amended Complaint, accompanied by a proposed Second Amended Complaint (“SAC”).
23 (ECF No. 68). The proposed SAC names a single Defendant, the United States, and asserts
24 a single claim pursuant to the FTCA. The proposed SAC alleges that Plaintiffs submitted
25 an administrative claim to the United States on February 3, 2020 and “[s]ince the FTCA
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27
28 ¹ The undersigned was designated to preside over this case on August 30, 2021. (ECF No. 62).

1 Section [of the U.S. Department of Justice] did not act within six (6) months (i.e., by
 2 August 5, 20[20]), its failure to issue a decision is treated as a final decision, enabling
 3 Plaintiffs here to proceed with their claims against the United States as of that date.” (*Id.*
 4 at 49, ¶ 131).

5 On February 25, 2022, the United States filed a Response in opposition to the Motion
 6 for Leave of Court to File SAC. (ECF No. 70). The United States contends:

7 [L]eave to amend should be denied as futile because Plaintiffs filed this
 8 lawsuit before their administrative claims were denied and before six months
 9 elapsed after they presented their administrative tort claims, and thus the
 10 Court lacks subject-matter jurisdiction over the sole claim asserted in the
 11 [proposed] SAC. The allegations in the [proposed] SAC do not and cannot
 12 correct this jurisdictional defect....

(*Id.* at 3).

13 On March 4, 2022, Plaintiff filed a Reply. (ECF No. 71). Plaintiffs contend that
 14 “Plaintiffs’ Proposed [SAC] constitutes a ‘new complaint’—one which for which the
 15 interests of justice, equity and fairness mandate that leave to amend be granted so that
 16 Plaintiffs’ FTCA claims against the United States can be tried on the merits.” (*Id.* at 6).

17 **II. LEGAL STANDARD**

18 Federal Rule of Civil Procedure 15 states that courts “should freely give leave [to
 19 amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). “This policy is to be applied
 20 with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
 21 Cir. 2003) (quotation omitted). The Supreme Court has identified several factors courts
 22 should consider when deciding whether to grant leave to amend “such as undue delay, bad
 23 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by
 24 amendments previously allowed, undue prejudice to the opposing party by virtue of
 25 allowance of the amendment, [and] futility of amendment...” *Foman v. Davis*, 371 U.S.
 26 178, 182 (1962). “[T]he general rule that parties are allowed to amend their pleadings does
 27 not extend to cases in which any amendment would be an exercise in futility or where the
 28 amended complaint would also be subject to dismissal.” *Novak v. United States*, 795 F.3d

1 1012, 1020 (9th Cir. 2015) (quotation omitted). “Futility alone can justify a court’s refusal
2 to grant leave to amend.” *Id.* (citation omitted).

3 **III. DISCUSSION**

4 The United States, as a sovereign, can only be sued to the extent it waives its
5 sovereign immunity and consents to be sued. *See United States v. Dalm*, 494 U.S. 596, 608,
6 (1990). “The FTCA waives the United States’ sovereign immunity for tort actions and vests
7 the federal district courts with exclusive jurisdiction over suits arising from the negligence
8 of government employees.” *D.L. by & through Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th
9 Cir. 2017) (citing, *inter alia*, 28 U.S.C. §§ 1346, 2671-80). “Before a plaintiff can file an
10 FTCA action in federal court, ... he must exhaust the administrative remedies for his
11 claim.” *Id.* (citing 28 U.S.C. § 2675(a)). An administrative claim is deemed exhausted once
12 the relevant agency finally denies it in writing, or if the agency fails to make a final
13 disposition of the claim within six months of the claim’s filing. *See* 28 U.S.C. § 2675(a).
14 “The FTCA’s exhaustion requirement is jurisdictional and may not be waived.” *D.L.*, 858
15 F.3d at 1244 (citation omitted).

16 “In general, the FTCA’s exhaustion requirement demands that a plaintiff exhaust his
17 administrative remedies before he files an FTCA claim in federal court.” *Id.* at 1245. This
18 general rule was established in *McNeil v. United States*, 508 U.S. 106 (1993), wherein the
19 Supreme Court held that a prematurely filed FTCA lawsuit must be dismissed even if the
20 plaintiff ultimately exhausts his administrative remedies before “substantial progress” has
21 occurred in the case. *Id.* at 110. The Court stated that “[t]he most natural reading of the
22 [FTCA] indicates that Congress intended to require complete exhaustion of Executive
23 remedies before invocation of the judicial process.” *Id.* at 112; *see also id.* (“Every
24 premature filing of an action under the FTCA imposes some burden on the judicial system
25 and on the Department of Justice which must assume the defense of such actions. Although
26 the burden may be slight in an individual case, the statute governs the processing of a vast
27 multitude of claims.”). “Because the [FTCA’s exhaustion] requirement is jurisdictional, it
28 must be strictly adhered to. This is particularly so since the FTCA waives sovereign

1 immunity. Any such waiver must be strictly construed in favor of the United States.” *Brady*
2 *v. United States*, 211 F.3d 499, 502 (9th Cir. 2000) (quotation omitted).

3 There are limited exceptions to *McNeil*’s general rule. Courts may grant leave to
4 amend “an existing complaint asserting *non-FTCA claims* to name the United States as a
5 defendant and include FTCA claims once those claims have been administratively
6 exhausted.” *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 856 (9th Cir. 2011) (emphasis
7 added). Similarly, in *D.L.*, the Court of Appeals concluded that the district court erred in
8 dismissing an FTCA claim on exhaustion grounds in a case that had been removed from
9 state court after an earlier remand. *See id.* at 1244. The plaintiff in *D.L.* had exhausted his
10 administrative remedies before amending his complaint in state court and then removing
11 the case to federal court for a second time. *Id.* at 1245. The Court of Appeals held that the
12 district court had jurisdiction over the FTCA claim, stating that the second removal was
13 not “a continuation of the federal case initiated by the first”; instead, “the second removal
14 actually constituted a new federal case, with a new case number and a new docket in the
15 federal district court.” *Id.* at 1246. In *Valadez-Lopez* and *D.L.*, the Court of Appeals
16 distinguished cases such as *McNeil*, in which a court lacks jurisdiction because the plaintiff
17 “filed *an FTCA lawsuit* before exhausting his or her FTCA administrative remedies.”
18 *Valadez-Lopez*, 656 F.3d at 856 (emphasis in original); *see D.L.*, 858 F.3d at 1246 (stating
19 that dismissal was not required because “the district court, unlike the court in *McNeil*, did
20 not retain jurisdiction over the premature FTCA complaint until it ripened upon
21 administrative exhaustion”).

22 In this case, Plaintiffs asserted an FTCA claim and named the United States as a
23 Defendant in the original Complaint and in the FAC. Plaintiffs filed the Complaint in this
24 Court three days after filing their administrative claim, prior to denial and well short of the
25 statutory six-month waiting period. Plaintiffs are not seeking to amend “an existing
26 complaint asserting *non-FTCA claims* to name the United States as a defendant and include
27 FTCA claims once those claims have been administratively exhausted.” *Valadez-Lopez*,
28 656 F.3d at 856 (emphasis added). Granting leave to amend will not “constitute[] a new

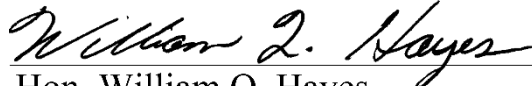
1 federal case, with a new case number and a new docket in the federal district court.” *D.L.*,
2 858 F.3d at 1246. This case falls within the “general rule [that] a premature ‘complaint
3 cannot be cured through amendment, but instead, plaintiff must file a new suit.’” *Duplan*
4 *v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) (quoting *Sparrow v. USPS*, 825 F. Supp.
5 252, 254-55 (E.D. Cal. 1993)); *see id.* (“Allowing claimants generally to bring suit under
6 the FTCA before exhausting their administrative remedies and to cure the jurisdictional
7 defect by filing an amended complaint would render the exhaustion requirement
8 meaningless and impose an unnecessary burden on the judicial system.”); *see also McNeil*,
9 508 U.S. at 112 (“Congress intended to require complete exhaustion ... before invocation
10 of the judicial process.”).

11 The Court finds that the proposed SAC “would also be subject to dismissal” for
12 failure to comply with the FTCA’s exhaustion requirement prior to the assertion of an
13 FTCA claim in this action. *Novak*, 795 F.3d at 1020. Accordingly, the Motion for Leave
14 of Court to File Second Amended Complaint is denied.

15 IV. CONCLUSION

16 IT IS HEREBY ORDERED that the Motion for Leave of Court to File Second
17 Amended Complaint is denied. (ECF No. 68). This action is dismissed without prejudice.
18 The Clerk of the Court shall close the case.

19 Dated: April 28, 2022

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21 Hon. William Q. Hayes
22 United States District Court
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